SEP 29 1983
ALEXANDER L. STEVAS,
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No. 83-540

IN THE
Supreme Court of the United States
October Term, 1983

THOMAS WESTBROOK,
Petitioner,

v.

HUTCHINSON CRANE EXCAVATING CO., INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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QUESTION PRESENTED

Whether § 33(b) of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 933(b) bars an employee's third-party action, brought later than six months after receipt of compensation under an award, where there exists specific evidence that a complex insurance scheme undermines the statutory purpose of § 33(a) and terminates the employees post-assignment rights under §§ 33(d) and 33(e)(2) of the LHWCA?

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IN THE

Supreme Court of the United States

October Term, 1983

No. 83-540

THOMAS WESTBROOK,
Petitioner,

v.

HUTCHINSON CRANE EXCAVATING CO., INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

Petitioner respectfully requests that this Court grant a Writ of Certiorari to review the Memorandum Opinion and Judgment of the District of Columbia Court of Appeals (No. 82-1151) dismissing Petitioner's appeal from an Order of Summary Judgment issued against him, and denying a Petition for Rehearing and/or Suggestion for Rehearing En Banc.

OPINIONS BELOW

The Superior Court for the District of Columbia Order of Summary Judgment, dated August 3, 1982, is unreported, but appears as Petitioner's Appendix A, pp. 1a-5a The opinion of the District of Columbia Court of Appeals, dated June 30, 1983, from which certiorari is sought, is unreported, but appears as Petitioner's Appendix B, pp. 6a-10a. The order of the District of Columbia Court of Appeals, dismissing the Petition for Rehearing and/or Suggestion for Rehearing En Banc, dated July 26, 1983, is unreported, but appears as Petitioners Appendix C, pp. 11a-12a.

JURISDICTION

The District of Columbia Court of Appeals decided this case on June 30, 1983 (App. B). A timely Petition for Rehearing and/or Suggestion for Rehearing En Banc was filed on July 18, 1983, and denied on July 26, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

RELEVANT STATUTES

The relevant statutory provisions are as follows:

DISTRICT OF COLUMBIA CODE:
§ 36-501. Longshoremen's and Harbor Workers' Compensation Act As Made Applicable to the District of Columbia.

> The provisions of the Longshoremen's and Harbor Workers' Compensation Act, including all amendments that may hereafter be made thereto, shall apply in respect to the injury or death of an employee or an employer carrying on any employ-

ment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in implying such provisions the term "employer" shall be held to mean every person carrying on any employment in the District of Columbia and the term "employee" shall be held to mean every employee of such person.

UNITED STATES CODE, TITLE 28:
§ 1254. Court of Appeals; Certiorari; Appeal; Certified Questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

UNITED STATES CODE, TITLE 33:
§ 904(a). Liability for Compensation.

Every employer shall be liable for and shall secure payment to his employees of the compensation payable under Section 907, 908 and 909. In the case of the employer who is a subcontractor, the contractor shall be liable for and shall secure the payments of such compensation to the employees of the subcontractor unless the subcontractor has secured such payment.

§ 905(a). Exclusiveness of Remedy and Third-Party Liability.

The liability of an employer prescribed in Section 904 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next-of-kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury

or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the Act or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

§ 932(a)(1)(A). Security for Compensation

(a) Every employer shall secure the payment of compensation under this Act –

(A) By insuring and keeping insured the payment of each compensation with any stock company or mutual company or association, or with any other person or fund, while such person or fund is authorized under the laws of the United States or of any State, to insure workmen's compensation, and (B) by the Secretary, to insure payment of compensation under this Act.

§ 933(a). If on account of a disability or death for which compensation is payable under this Act the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

§ 933(b). Compensation for Injuries Where Third Persons Are Liable.

Acceptance of such compensation under an award in a compensation order filed by the dep-

uty commissioner or Board shall operate as an assignment to the employer of all rights of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

§ 933(d). Compensation for Injuries Where Third Persons are Liable.

Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

§ 933(3)(1)(A)-(D). Compensation for Injuries Where Third Persons Are Liable.

Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to—

(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner or Board);

(B) the cost of all benefits actually furnished by him to the employee under section 7;

(C) all amounts paid as compensation;

(D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished

> under section 7, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative.

§ 933(e)(2). Compensation for Injuries Where Third Persons Are Liable.

> Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:
>
> . . . .
>
> The employer shall pay excess to the person entitled to compensation or to the representative, less one-fifth of such excess which shall belong to the employer.

§ 33(h). Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section.

§ 938(a). Penalty For Failure To Secure Payments of Compensation.

> Any employer required to secure the payment of compensation under the Act who fails to secure such compensation shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than $1,000, or by imprisonment; and in any case where such employer is a corporation, the president, secretary and treasurer thereof shall be also severally

liable to such fine or imprisonment as herein provided for the failure of such corporation to secure the payment of compensation; and such president, secretary and treasurer shall be severally personally liable, jointly with such corporation, for any compensation or other benefit which may accrue under the said Act in respect to any injury which may occur to any employee of such corporation while it shall so fail to secure the payment of compensation as required by Section 932 of this Act.

STATEMENT OF THE CASE

Petitioner, Thomas Westbrook, was a carpenter employed by George Hyman Construction Company. He was injured on June 16, 1976 while working at a Washington Metropolitan Area Transit Authority (hereinafter WMATA) construction site when the concrete form on which he was standing, fell. Subsequently he received compensation pursuant to a formal award encompassed in a compensation order and filed by the Deputy Commissioner on or about May 25, 1977. The instant action was commenced on June 15, 1979, admittedly more than six months after entry of the award. The trial court granted summary judgment to defendant below on August 3, 1982, ruling the action was barred by § 33(b) of the LHWCA. The District of Columbia Court of Appeals affirmed on June 30, 1982, holding in effect that the conflict of interest analysis of *Czaplicki v. The Hoegh Silvercloud,* 351 U.S. 525 (1956) did not survive the 1959 amendment to the Act in accordance with this Court's holding in *Rodriguez v. Compass Shipping Company,* 451 U.S. 596 (1981). Thus the Court ruled that petitioner's arguments concerning the WMATA Coordinated Insurance Program were irrelevant, and that the action was barred by the six

month statutory assignment provision of § 33(b). Petitioner submits that the insurance arrangement herein in fact deviates from the statutory requirements of § 4 of the Act, and necessarily terminates the post-assignment rights given him by Congress in §§ 33(d) and (e)(2), and that for these reasons the carrier should not benefit from a § 33(b) assignment.

Under WMATA's Coordinated Insurance Program, WMATA, rather than its subcontractors, purchased the workers' compensation insurance for the employees of its subcontractors. WMATA's Coordinated Insurance Program, (hereinafter referred to as CIP) also referred to as wrap-up insurance, involves WMATA's selection of a single insurance carrier, Lumberman's Mutual Casualty Company, to insure all workers' compensation and third party liability claims arising out of WMATA's subway construction, and WMATA's payment for this insurance coverage. With regard to this arrangement, the United States Court of Appeals for the District of Columbia has recently held in the case of *Johnson v. Bechtel Associates Professional Corp., D.C.,* et al. (Decided August 19, 1983, App. D) that WMATA's wrap-up plan circumvents the statutory scheme intended by Congress and preempts the subcontractors' statutory duty to secure its own workers' compensation insurance coverage. (Decision at 18-19). Petitioner asserts herein that this wrap-up insurance plan also is designed to limit his third-party rights under section 33(a) of the Act and to terminate his post-assignment rights under §§ 33(d) and (e)(2). For these reasons, the action herein should not be barred by the statutory assignment provisions of § 33(b).

The Court should be made aware that petitions are presently pending before it concerning precisely the same

issue herein, in the cases of *George Phillippi, et al. v. Bechtel Associates Professional Corp., D.C. et al.*, (October 1982 term), *Lyle Edwards, et al.* and *Darwin H. Smith v. Bechtel Associates Professional Corp., D.C., et al.*, (October 1983 term).

ARGUMENT

WMATA'S CIP ATTEMPTS TO LIMIT PETITIONER'S THIRD PARTY RIGHTS UNDER § 33(a) OF THE LHWCA AND TO EXTINGUISH THE PETITIONER'S POST-ASSIGNMENT RIGHTS UNDER § 33(d) AND § 33(e)(2). FOR THESE REASONS § 33(b) SHOULD NOT OPERATE AS A BAR TO PETITIONER'S ACTION HEREIN.

In the process of resolving the several issues presented in a consolidated appeal, the United States Court of Appeals for the District of Columbia Circuit held, in the case of *Johnson v. Bechtel Associates Professional Corp., D.C., et al.* (Slip Opinion Decided August 19, 1983), that the CIP initiated by WMATA deviated from the statutory scheme mandated by the Act. The upshot of WMATA's insurance scheme was to circumvent the statutory purpose of the Act to the detriment of the injured worker the Act was designed to protect. The Court in *Johnson* expressly stated, "[the fact] that it was more convenient and cost effective to WMATA to carry the insurance does not excuse deviation from the statutory scheme" *Id.*, at 19. The *Johnson* Court concluded that WMATA's failure to follow the language of the Act by unilaterally initiating its wrap-up insurance plan and preempting the subcontractor's primary statutory duty to secure compensation coverage resulted in confusion as to which entity was a third party under § 33(a) and which was an employer entitled to immunity under § 5(a) (Decision at 20.) The

Court held that WMATA remained subject to suit as a third party, and was not immune by virtue of its creation of the CIP as an "employer," as claimed by WMATA.

It is undisputed that Congress' overriding concern in promulgating the Act was to preserve and protect the rights of the injured workers. Petitioner submits that WMATA's CIP obscures the rights and remedies of the injured worker and is in fact designed to lessen rather than safeguard the rights of the injured workers. Petitioner submits that WMATA's insurance scheme goes beyond the conflict of interest situation presented in *Czaplicki v. The Hoegh Silvercloud,* 351 U.S. 525 (1956). The insurance scheme herein subverts the Congressional intent of § 33(a), which allows injured workers to sue third parties for damages, by permitting WMATA, a potential third party defendant, to claim immunity by its "quid pro quo" purchase of compensation for its contractors. Further, the CIP deviates from the statutory requirements of § 4(a) by preventing WMATA's subcontractors from fulfilling their statutory obligation to secure their own compensation. For these reasons, § 33(b) should not be allowed to bar petitioner's cause of action, for only the carrier which is subrogated to the employer's interest under § 33(h), and ultimately WMATA itself, will benefit from the assignment.

In addition to interfering with Petitioner's rights under § 33(a), WMATA's CIP has violated additional statutory provisions in the LHWCA. Because wrap-up insurance was designated to create one deep pocket for all subway construction and thereby save money, the insurance scheme thwarts the post assignment rights of the injured worker under § 33(d) and § 33(e).

Section 33(d) of the LHWCA states that "[s]uch

employer on account of such assignment *may either* institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding." 33 U.S.C. § 933(d) (emphasis added). Petitioner notes that a plain reading of § 33(d) mandates that, upon assignment of the employee's claim, an employer or the substituted carrier under § 33(h) must take some action to pursue the employee's third-party claim. Although § 33(d) does mandate some action by the employer, the language of this subsection is flexible in providing the employer with two means of pursuing the third-party claim: compromising with the third party or initiating a suit against the third party. In the present case, the CIP necessarily results in the abandonment of all third-party rights, since one deep pocket has been deliberately created by the plan. Thus, the intent of § 33(d) is frustrated since Lumbermen's Mutual has no interest and no intention of performing either of its statutory duties under § 33(d).

A second subsection, § 33(e)(2), 33 U.S.C. § 933(e)(2), further encourages the pursuit of the assigned claim by endowing the employer with a monetary interest in the employee's claim. Prior to the 1959 amendments, § 33(e)(2) merely required the employer to "pay any excess [recovery] to the person entitled to compensation or to the representative". 33 U.S.C. § 933(e)(2) (1927), amended by Pub. L. 86-171, 73 Stat. 391 (1959). Upon the enactment of the 1959 amendments, § 33(e)(2) was amended to read as follows: "The employer shall pay any excess . . . to the person entitled to compensation . . . , less one-fifth of such excess which shall belong to the employer." 33 U.S.C. § 933(e)(2) (1976) (emphasis added). Thus, consistent with the equitable nature of the 1959 amendments, Congress added language which would encourage the employer to

pursue an employee's third-party claim. In the event of recovery, the amended language rewards the employer with twenty percent (one-fifth) of that portion of the third-party recovery not already allocated to the employer under § 33(e)(1).

Contrary to the language and intent of § 33(d) and § 33(e)(2), WMATA's insurance scheme actually encourages the employer not to bring suit. WMATA's CIP is specifically designed to save money (Johnson decision at p. 19). But by having one carrier for all compensation and liability claims, the provisions of § 33(d) and § 33(e)(2) are made meaningless for all injuries which are covered by the plan. In amending § 33(b), Congress clearly could not have foreseen a scheme which undermines other subsections of § 33. The different provisions of § 33 can only be examined as a whole, for this section contains an entire network of checks and balances designed to protect both the interests of the injured worker and his employer. WMATA's insurance plan interferes with this statutory plan by rendering meaningless the provisions of § 33(d) and § 33(e), which protect the rights of the employee even after a statutory assignment under § 33(d).

CONCLUSION

Petitioner, Thomas Westbrook, respectfully submits that the petitioner herein has shown "specific evidence of a serious conflict of interest Congress could not have foreseen when it enacted and amended § 33(b)," (*Rodriguez* at 618), and the action herein should not be barred by the assignment provisions of § 33(b). For the above stated reasons, petitioner respectfully requests that this Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
CIVIL DIVISION

BRUCE L. JONES DORIS S. JONES, Plaintiffs	:	CA 7606-79
v.	:	Civil I – Judge Doyle
HUTCHINSON CRANE EXCAVATING CO., INC., Defendant	:	

THOMAS WESTBROOK, Plaintiff	:	
v.	:	CA 7621-79
HUTCHINSON CRANE EXCAVATING CO., INC., Defendant	:	

OPINION

Before the Court is a Motion of Defendant, Hutchinson Crane Excavating Company, Inc. for Summary Judgment and points and authorities submitted in support thereof and in opposition thereto. This cause consists of the consolidated cases of *Bruce L. Jones v. Hutchinson Crane Excavating Company, Inc.* and *Thomas Westbrook v. Hutchinson Crane Excavating Company, Inc.* Nevertheless, the Court notes that the subject Motion for Summary Judgment proceeds solely as against Plaintiff Westbrook.

This is a negligence action wherein the Plaintiffs allege that on June 16, 1976, while employed as carpenters by the George Hyman Construction Company at a Metro System job site, the two male plaintiffs were injured when a crane owned by the Defendant and operated by an employee of the Defendant tipped over. The record reflects that Plaintiff Westbrook subsequently filed for and began receiving workmen's compensation benefits on December 17, 1976. The record further reflects that on May 24, 1977 a settlement agreement was entered into between Plaintiff Westbrook and the workmen's compensation carrier, which agreement was incorporated into a compensation order signed by the deputy commissioner, Office of Workers' Compensation Programs, United States Department of Labor, on June 23, 1977. The instant third-party action was filed nearly two years later on June 15, 1979.

The Defendant has filed a Motion for Summary Judgment alleging that Plaintiff Westbrook's third-party action is barred by the six-month statute of limitations contained in Section 33(b) of the Longshoremen's and Harbor Workers Compensation Act, 33 U.S.C. § 901, et seq. (1976) [hereinafter "the Act"]. Plaintiff Westbrook, in opposition to the said Motion, contends, *inter alia,* that the circumstances of the instant action reflect such a serious conflict of interest as to preclude the operation of the Section 33(b) statute of limitations. Specifically, Plaintiff Westbrook avers that the Lumbermen's Mutual Casualty Company acted as insurance carrier for Plaintiff Westbrook's employer, as well as for the Defendant herein. As such, Plaintiff Westbrook contends that the carrier would have had no interest in pursuing a third-party action in the premises, since to have done so would have constituted, in essence, an action against itself. In support of this proposition, Plaintiff Westbrook refers the Court to the case

of *Czaplicki v. The S.S. Hoegh Silvercloud,* 351 U.S. 525 (1956), wherein the Supreme Court held that an injured employee could enforce his right of action against a third-party notwithstanding his acceptance of compensation from his employer, and a concommitant assignment to the employer of the third-party claim, because of the same type conflict of interest alleged to exist in the instant action.

Section 33(b) of the Act provides that:

> Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or [Benefits Review] Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such an award. 33 U.S.C. § 933(b).

The Supreme Court, in the case of *Rodriguez v. Compass Shipping Co., Ltd.,* 101 S.Ct. 1945 (1981) stated that "(t)he language of § 33(b) is both mandatory and unequivocal." 101 S.Ct. at 1950. The Court further declared that the plain language of the statute compels that once a compensation order is filed by the deputy commissioner or Board, and after the passage of the required six-month period, the employee's entire right to commence a third-party action is automatically assigned to the employer and the employee is entirely divested of his right to sue.

The Court in *Rodriguez* spoke at great length about the *Czaplicki* decision and described the exception to § 33(b) as contained in the latter case as being quite "limited." 101 S.Ct. at 1950. The Court further conducted a detailed review of the legislative history of the Act and the amend-

ments thereto. Specifically, the Court noted that the 1959 amendments to the Act contained a solution to the problems created by the potential conflicts of interest among the employee, employer and third-party. That solution was embodied in § 33(b) wherein the assignment of the third-party claim was postponed until six months after the acceptance of compensation under an award.

After the Court in *Rodriguez* expressly stated that it was not deciding whether, or to what extent, *Czaplicki* survived the 1959 amendments, 101 S.Ct. at 1955, n. 30, it nevertheless declared as follows:

> As our analysis indicates, the 1959 and 1972 Amendments have substantially undercut the basis for the *Czaplicki* exception to § 33(b). The Court was troubled in *Czaplicki* because under the Act in 1956 there was "no other procedure" by which a longshoreman could enforce his rights against a third party where the employer failed to sue due to a conflict of interest. [footnote omitted]. After the 1959 Amendments, there is such a procedure: the employee may simply file his own third-party suit within six motnhs after accepting compensation. 101 S.Ct. at 1957, n. 41.

The Court notes that this is not a case wherein the plaintiff alleges that no formal award was entered so as to trigger the § 33(b) assignment provision. Clearly, a formal compensation order was entered on June 23, 1977. As such, and pursuant ot the Supreme Court's clear implication as to the invalidity of the premise underlying the *Czaplicki* decision, as a result of the 1959 amendments to the Act, the Court finds that Plaintiff Westbrook's action is barred by operation of the § 33(b) six month statute of limitations.

Wherefore, upon consideration of the Motion of Defendant for Summary Judgment and the points and authorities submitted in support thereof and in opposition thereto, and after oral hearing in open Court, and the Court findings upon the pleadings, exhibits and depositions on file that there exists no genuine issue of material fact and that the Defendant is entitled to judgment as a matter of law, it is by the Court this 3rd day of August, 1982

ORDERED

1. That the Motion of the Defendant for Summary Judgment be and the same hereby is granted; and

2. That the complaint filed in the premises by Thomas Westbrook in CA 7621-79 be and the same hereby is dismissed with prejudice.

[sgd] John F. Doyle
JUDGE JOHN F. DOYLE

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FILED
IN OPEN COURT
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Superior Court of the
District of Columbia
Washington, D.C.

APPENDIX B

DISTRICT OF COLUMBIA COURT OF APPEALS

NO. 82-1151

THOMAS WESTBROOK, APPELLANT,
CA 7621-79

v.

CA 7606-79

HUTCHINSON CRANE EXCAVATING CO., INC., APPELLEE.

Appeal from the Superior Court of the District of Columbia

(Hon. John F. Doyle, Trial Judge)

Argued April 26, 1983 Decided June 30, 1983)

Before: Mack, Ferren, and Pryor *Associate Judges*

MEMORANDUM OPINION AND JUDGMENT

Appellant, Thomas Westbrook, initiated a negligence action, in the Superior Court of the District of Columbia against appellee, Hutchinson Crane Excavating Co., Inc. On August 3, 1982, the trial court granted appellee's motion for summary judgment and this appeal followed.

Appellant, a carpenter employed by George Hyman Construction Company, was seriously injured, while working at a Washington Metropolitan Area Transit Authority (hereinafter WMATA) construction site, when a concrete form on which he was standing, fell. On December 17, 1976, appellant began receiving workmen's compensation benefits, and on May 24, 1977, a settlement was agreed upon by appellant and Lumberman's Mutual Casualty Co., the Workmen's Compensation carrier. On May 25, 1977, the agreement was incorporated into an

order signed by the deputy commissioner, Office of Workers' Compensation Programs, United States Department of Labor. On June 15, 1979, more than two years after receiving compensation, appellant filed this action against appellee, a company involved in the same construction project.

I.

Appellant ccontends that the trial court erred when it found that § 933 of the Longshoremen's and Harbor Workers' Act, 33 U.S.C. § 901 *et seq.* (hereinafter "the Act") (D.C. Code § 36-501 (1973)), barred him from asserting a third party claim against appellee, and assigned all such rights to his employer. Section 933 states in pertinent part:

> (b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or [Benefits Review] Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

Appellant argues that because § 933(b) allows an employer to pursue third-party claims as reimbursement for its losses, the provision is only triggered when an employer has complied with § 904(a) of the Act[1] which re-

[1]Section 904(a) reads in its entirety:

> Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title. In the case of an employer who is a subcontractor, the contractor shall be laible for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment.

quires that an employer "secure" compensation insurance for its employees. In the instant case, the George Hyman Construction Company secured compensation payments, although WMATA paid for it, under the terms of its contract with WMATA. Moreover, the compensation claim, filed by appellant was made against his employer and benefits therefrom were paid against that named policy. We conclude that within the meaning of the statute, George Hyman Construction Company did secure insurance, was responsible for it, and indeed was a named insurer. Under the facts of this case, the statute is satisfied.

II.

Appellant next asserts that a serious conflict of interest exists, sufficient to carve an exception to § 933. Specifically, he argues that there is a disincentive for his employer to sue because both appellee and his employer were required by WMATA to subscribe to the same insurance program offered by the Lumberman Mutual Casualty Company. Appellant therefore relies upon *Potomac Electric Power Company v. Wynn,* 120 U.S. App. D.C. 13, 343 F.2d 295 (1965) to support his position that the running of the six-month period does not preclude him from bringing a third-party suit, where a conflict of interest exists.

We acknowledge that the court in *Wynn* found that an ". . . employee may bring suit against a third party whenever it is evident that the employer-assignee, for whatever reason, does not intend to bring suit." *Id.* at 16, 298. However, the force of that holding was expressly diminished by the Supreme Court's decision in *Rodriguez v. Compass Shipping Co.,* 451 U.S. 596 (1981), and we have recently so held. *See Dodson v. Washington Automotive Company,* No. 81-1466 (D.C., May 16, 1983). In *Rodriguez* the court interpreted § 933(b) in light of its

legislative history and the 1959 and 1972 amendments and concluded that the six-month period following an award is "both mandatory and unequivocal." *Rodriguez v. Compass Shipping Co., supra,* 451 U.S. at 602. We therefore conclude that the trial court did not err in relying upon *Rodriguez* when it stated ". . . that once a compensation order is filed by the deputy commissioner or Board, and after the passage of the required six-month period, the employee's entire right to commence a third-party action is automatically assigned to the employer and the employee is entirely divested of his right to sue."

By supplemental brief filed a few days before argument, counsel urges us to limit the application of *Rodriguez* to prospective cases only. The spirit of *Rodriguez* in setting a six-month limitation after the receipt of the award incorporates a requirement already presumed – that a suit against a third party growing out of the same injury be brought within a reasonable time. Here, where appellant waited two years after the award to decide to bring this action, we are not persuaded by this argument. *See Mendez v. Johnson,* 389 A.2d 781 (D.C. 1978) (en banc). Accordingly it is,

ORDERED and ADJUDGED that the judgment on appeal be, and it hereby is, affirmed.

FOR THE COURT:

/s/ Alan I. Herman
ALAN I. HERMAN
Clerk of the Court.

Copies to:

Hon. John F. Doyle

Clerk, Superior Court

Michael H. Feldman, Esq.
2000 "L" St., NW, #700 (36)

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1314 - 19th St., NW (36)

DISTRICT OF COLUMBIA
COURT OF APPEALS
FILED JUNE 30 1983
/s/ Alan I. Herman
Clerk

APPENDIX C

DISTRICT OF COLUMBIA
COURT OF APPEALS
500 Indiana Avenue, N.W.
Washington, D.C. 20001
(202) 638-7113

NO. 82-1151

THOMAS WESTBROOK,

Appellant,

v.

CA 7621-79
CA 7606-79

HUTCHINSON CRANE EXCAVATING CO., INC.,

Appellee.

BEFORE: Newman, Chief Judge; Kern, Nebeker, *Mack, *Feren, *Pryor, Nelson, and Terry, Associate Judges.

ORDER

On consideration of appellant's petition for rehearing and/or suggestion for rehearing en banc, it is

ORDERED by the division that appellant's petition for rehearing is denied; and it appearing that no judge of this Court has called for a vote thereon, it is

*denotes merits division

FURTHER ORDERED that appellant's petition for rehearing en banc is denied.

PER CURIAM.

Copies to:

Honorable John F. Doyle
Clerk, Superior Court

Michael H. Feldman, Esquire
2000 L Street, N.w.
Suite 700
Washington, D.C. 20036

Laurence T. Scott, Esquire
1314 19thg Street, N.W.
Washington, D.C. 20036

DISTRICT OF COLUMBIA
COURT OF APPEALS
FILED JUL 26 1983
/s/ Alan I. Herman
Clerk

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-2017

PAUL D. JOHNSON, APPELLANT

v.

BECHTEL ASSOCIATES PROFESSIONAL CORPORATION, D.C., ET AL.

No. 82-1784

HOWARD L. EIGHMEY, ET AL., APPELLANTS

v.

BECHTEL CIVIL AND MINERALS, INC., ET AL.

No. 82-1809

CALVIN WALKER, ET AL., APPELLANTS

v.

BECHTEL CIVIL AND MINERALS, INC., ET AL.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

No. 82-1813

JOHN WARREN CLANAGAN, APPELLANT

v.

BECHTEL ASSOCIATES PROFESSIONAL CORPORATION, D.C., ET AL.

No. 82-1899

PAUL D. JOHNSON, APPELLANT

v.

BECHTEL ASSOCIATES PROFESSIONAL CORPORATION, D.C., ET AL.

No. 82-2062

CALVIN WALKER and RENA WALKER, APPELLANTS

v.

BECHTEL ASSOCIATES PROFESSIONAL CORPORATION, D.C., ET AL.

No. 82-2063

JOHN WARREN CLANAGAN, APPELLANT

v.

BECHTEL ASSOCIATES PROFESSIONAL CORPORATION, D.C., ET AL.

No. 82-2148

HOWARD L. EIGHMEY, ET AL., APPELLANTS

v.

BECHTEL ASSOCIATES PROFESSIONAL CORPORATION, D.C., ET AL.

No. 82-2374

STANLEY WILMES, APPELLANT

v.

BECHTEL ASSOCIATES PROFESSIONAL CORPORATION, D.C., ET AL.

No. 82-2458

PAUL D. JOHNSON, APPELLANT

v.

BECHTEL ASSOCIATES PROFESSIONAL CORPORATION, D.C., ET AL.

No. 82-2459

JAMES H. BUCHANAN and SHIRLEY BUCHANAN, his wife, APPELLANTS

v.

BECHTEL ASSOCIATES PROFESSIONAL CORPORATION, D.C., ET AL.

No. 82-2525

STANLEY WILMES, APPELLANT

v.

BECHTEL ASSOCIATES PROFESSIONAL CORPORATION, D.C., ET AL.

No. 82-2529

CALVIN WALKER, ET AL., APPELLANTS

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

No. 82-2530

JOHN WARREN CLANAGAN, APPELLANT

v.

BECHTEL ASSOCIATES PROFESSIONAL CORPORATION, D.C., ET AL.

No. 82-2531

HOWARD L. EIGHMEY, ET AL., APPELLANTS

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, ET AL.

No. 83-1003

GLENWOOD WILLIAMS, APPELLANT

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

Appeals from the United States District Court
for the District of Columbia

(D.C. Civil Action Nos. 81-00963, 81-01261, 81-01125, 81-01481, 81-00114, 81-03057 and 82-00999)

Argued March 28, 1983

Decided August 19, 1983

Peter J. Vangsnes and *William F. Mulroney*, with whom *James M. Hanny* and *Michelle A. Partiff* were on the brief, for appellants. *Michael H. Feldman*, also entered an appearance for appellants.

Gary W. Brown, with whom *James F. Bromley*, *James W. Greene*, *William G. Schaefer* and *Ronald Flagg* were on the brief, for appellees, Bechtel Associates Professional Corporation, et al. *Catherine H. Lesica* and *Elaine L. Johnston*, also entered appearances for appellees, Bechtel Associates Professional Corporation, et al.

Vincent H. Cohen, with whom *Robert B. Cave* was on the brief, for appellee, Washington Metropolitan Area Transit Authority.

Robert L. Ellis, *Edward J. Lopata*, *J. Joseph Barse*, *F. Wainwright Barnes*, and *Laurence T. Scott* were on the joint brief of amici curiae, Metro Subway Construction Contractor/Employers.

Before: ROBINSON, *Chief Judge*, WRIGHT, *Circuit Judge* and MACKINNON, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* MACKINNON.

MACKINNON, *Senior Circuit Judge*: These consolidated appeals [1] arise from negligence actions instituted by employees of contractors who performed underground work on the Washington Metropolitan Area Transit subway project (Metro). With the exception of Eighmey who was injured in a construction accident, the appellants allegedly sustained respiratory injuries as a result of exposure to high levels of silica dust and other industrial pollutants in the subway project. The injured employees all filed workmen's compensation claims and received compensation awards. The employees then instituted third-party negligence actions against either the Washington Metropolitan Area Transit Authority (WMATA or the Authority)[2] or Bechtel,[3] the safety engineer for the project.

Because of the nature of the contractual relationship between the parties, WMATA or Bechtel appeared to be a proper third-party defendant. WMATA exercises the ulti-

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[1] Because of the similarity of issues in the numerous actions growing out of the WMATA construction, the court ordered these appeals consolidated and expedited. Johnson v. Bechtel Assoc. Prof. Corp., No. 82-2017 (D.C. Cir. Jan. 7, 1983).

[2] The Washington Area Metropolitan Transit Authority (WMATA or the Authority) is a legal entity created by and deriving its authority from an interstate compact (Compact) entered into by Maryland, Virginia, and the District of Columbia with the consent of Congress. U.S. CONST. art. I, § 10, cl. 3. WMATA was formed to develop and operate a transit system (Metro) in the District of Columbia metropolitan area. Pub. L. No. 89-774, 80 Stat. 1324 (1966) (codified at D.C. Code § 1-2431 (1981)). The Authority may sue and be sued. Compact § 12.

[3] Two Bechtel entities were sued in the district court actions, Bechtel Civil and Minerals, Inc., a Nevada corporation, and its local affiliate, Bechtel Associates Professional Corporation. The two corporations are indistinguishable for the purposes of these appeals and therefore will both be referred to simply as "Bechtel."

mate control of and authority for the construction and operation of the subway system. WMATA contracted with Bechtel to provide safety engineering services. Contracts for the actual construction work were awarded to a variety of subcontractors. Appellants were employees of these subcontractors.

In the district court each defendant, WMATA or Bechtel, moved for and was granted summary judgment. Appellants contest these judgments and present four issues for our resolution. We discuss each issue separately and conclude:

(1) Bechtel was an agent of WMATA and therefore, under section 80 of the Compact, WMATA is exclusively liable for Bechtel's torts. Accordingly we affirm the grant of summary judgment to Bechtel on this issue.

(2) WMATA is not entitled to the immunity accorded to employers under section 905(a) of the Longshoremen's Act. Accordingly we reverse the grant of summary judgment to WMATA on this issue.

(3) A more complete factual record is necessary to determine whether, under FED. R. CIV. P. 15(c), WMATA was properly added as a defendant. Accordingly we remand these cases.

(4) Under section 33(b) of the Longshoremen's Act an injured employee cannot institute a third-party negligence action after the expiration of the six-month period following acceptance of a compensation award. Accordingly we affirm the dismissal of the *Williams* case.

I. SECTION 80 OF THE WMATA COMPACT

Defendant Bechtel based its motion for summary judgment upon section 80 of the WMATA Compact.[4] Section 80 establishes WMATA's contract and tort liability and provides:

---

[4] *See* note 2 *supra*.

> The Authority shall be liable for its contracts and for its torts and those of its Directors, officers, employees and agent committed in the conduct of any proprietary function, in accordance with the law of the applicable signatory (including rules on conflict of laws), but shall not be liable for any torts occurring in the peformance of a governmental function. The exclusive remedy for such breach of contracts and torts for which the Authority shall be liable, as herein provided, shall be by suit against the Authority. Nothing contained in this Title shall be construed as a waiver by the District of Columbia, Maryland, Virginia and the counties and cities within the Zone of any immunity from suit.

Bechtel asserted that it functioned as an "agent" of WMATA when performing its safety duties, and was therefore entitled to immunity from negligence actions by operation of section 80 of the Compact. Bechtel argued that WMATA was exclusively liable for any work-related tortious injury suffered by the employees. Each district court which considered this issue found that Bechtel was an agent of WMATA within the meaning of section 80 and granted summary judgment.[8] We affirm the judgments of the district courts on this issue.

A. *Legal Standard*

While conceding that, in its role as safety engineer, Bechtel was an agent of WMATA within the "broadest terms," appellants nevertheless assert that the term "agent" in section 80 of the Compact should be given a narrow construction. Appellants attempt to remove

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[8] Appellants challenge the grant of summary judgment on the section 80 issue in the following cases: Johnson v. Bechtel Assoc. Prof. Corp., No. 81-0963 (D.D.C. July 21, 1982); Walker v. Bechtel Civil and Minerals, Inc., No. 81-1125 (D.D.C. July 8, 1982); Clanagan v. Bechtel Assoc. Prof. Corp., No. 81-1481 (D.D.C. July 8, 1982); Eighmey v. Bechtel Civil and Minerals, Inc., No. 81-1261 (D.D.C. June 21, 1982).

Bechtel from the operation of section 80 by arguing that Bechtel was an "independent contractor"-agent and, therefore, not within the class of "servant"-agents for whom a principal is vicariously liable. However, this attempted distinction, based primarily upon the Restatement (Second) of Agency (1958), fails because resolution of this issue turns on the use of the word "agent" within a statute expressly designed to shift liability exclusively to the principal, WMATA.[6] While resort to the Restatement may be informative, it is not dispositive; instead, we look to the statute itself.

The use of the word "agent" in section 80 is unqualified[7] and there is no reason, under these circumstances,

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[6] Appellants' reliance on the Restatement is misplaced. While the Restatement does distinguish between "servants" and "independent contractors" for some purposes, it also makes clear that both "servants" and "independent contractors" may be agents. Restatement (Second) of Agency § 2 (1958).

Section 251 of the Restatement, applied to the situation herein, obviates the need for any distinction between "servants" and "independent contractors" or "non-servants agents."

> § 251. Liability for Physical Harm Caused by a Servant or a Non-servant Agent
>
> A principal is subject to liability for physical harm to the person . . . of another caused by the negligence of a servant or a non-servant agent:
>
> (a) in the performance of an act which the principal is under a duty to have performed with care . . . .

Restatement (Second) of Agency § 251 (1958).

WMATA, the principal, had a duty to protect workers from physical harm caused by the construction of Metro. By entrusting the performance of that duty to an agent (Bechtel), WMATA is liable for any harm caused by its agent's negligence, regardless of whether the agent was a servant or an independent contractor. *See* Restatement (Second) of Agency § 251 comment (a) (1958).

[7] Appellants suggest that the legislative history of the Compact reveals that the term "agent" was intended to have an extremely narrow meaning. The only "legislative history"

> Contracting Officer and the authorized representative of the Contracting Officer to whom [Bechtel] shall report and be responsible.

In addition to specifying the general working relationship, the WMATA-Bechtel contract provides that all personnel hired by Bechtel for the WMATA project must be approved by WMATA. General Provisions, Art. IX. The salaries of these employees are also subject to approval by WMATA. Special Provisions, Sec. III. Once WMATA approves a Bechtel employee to serve as an on-site Resident Engineer, Bechtel cannot transfer, reassign, or fire him without the Authority's approval.[9]

The allocation of authority and responsibility between WMATA and Bechtel is further specified in the Coordinated Safety Program & Reporting Procedures Manual which is specifically incorporated into the WMATA-Bechtel contract. The Safety Manual provides that a full-time WMATA employee, the Contracting Officer, has primary responsibility for overseeing the safety-related aspects of the project. Another WMATA official, the Safety Engineer, is charged with evaluating and directing the activities of the Bechtel Safety Department. Taken as a whole, the WMATA-Bechtel contract provides for extensive and pervasive control by WMATA over Bechtel personnel.

The actual day-to-day work performed by Bechtel on the construction sites reinforces the conclusion that Bechtel serves as WMATA's agent.[10] On the job site the Resident Engineer, a Bechtel employee, represents WMATA

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[9] At a hearing conducted by the district court in Johnson v. Bechtel Assoc. Prof. Corp., No. 81-0963, on May 17, 1982, John S. Egbert, Assistant General Manager for Design and Construction for WMATA (Contracting Officer), testified to the working relationship between WMATA, Bechtel, and the subcontractors. The relevant testimony is contained in Appellees Record Excerpts 22-23, 31, and 51.

and is responsible for ensuring that the various contractors comply with WMATA safety regulations. In the discharge of his duties, Bechtel's Resident Engineer is subject to the direction of the WMATA Contracting Officer from whom he receives both written and verbal instructions. Although the Resident Engineer is authorized to direct correction of safety violations, in practice he rarely takes any major action without first consulting WMATA. The Resident Engineers carry business cards identifying them as "Authorized Representative[s] of the Contracting Officer," *i.e.*, WMATA. In their daily work, the Bechtel safety personnel are subject to the direction of WMATA officials and function essentially as WMATA employees.

C. *Conclusion*

It is unimportant whether the WMATA-Bechtel relationship was a master/servant agency relationship or a principal/independent contractor agency relationship. "Agent," as used in the Compact, is unqualified and, therefore, embraces both types of agency relationships.

To determine if a party is an "agent" within the broadest meaning of the term, the court looks to the entirety of the relationship for evidence of *consent* between the parties to establish a principal-agent relationship and for evidence of the degree of *control* exercised by the principal. The district courts correctly concluded that both mutual consent and a sufficient degree of control were present in the WMATA-Bechtel relationship to establish that Bechtel acted as an agent of WMATA. By the terms of section 80 of the Compact, therefore, WMATA is exclusively liable for the torts of its agent, Bechtel. We affirm the grant of summary judgment to Bechtel on this issue.

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[10] *See* note 9 *supra*.

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[10] *See* note 9 *supra*.

II. Section 905 of the Longshoremen's and Harbor Workers' Compensation Act

At the time of their alleged injuries, the appellants were employed by construction companies under contract to WMATA to construct specific segments of the Metro project. These subcontractors did *not* purchase workmen's compensation insurance for their employees; instead WMATA purchased such insurance to cover all laborers and other employees working on the Metro system. After sustaining an injury, each employee filed for and received workmen's compensation benefits. Exercising their statutory right to sue a third-party tortfeasor, several of the injured employees instituted an action against WMATA.

WMATA responded with a motion for summary judgment, asserting that because it obtained and paid for the workmen's compensation insurance required by section 904(a)[11] of the Longshoremen's and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901 *et seq.* (1976 & Supp. V 1981),[12] it was entitled to the statutory immunity accorded to an "employer" under section 905(a).[13] Each federal district court which considered

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[11] The Act, 33 U.S.C. § 904(a) (1976), provides:

> (a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908 and 909 of this title. In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to the employees of the subcontractor unless the subcontractor has secured such payment.

[12] The District of Columbia Workers' Compensation Act, D.C. Code § 36-501 *et seq.* (1973), adopted the provisions of the federal Longshoremen's and Harbor Workers' Compensation Act. For simplicity, the Act will be referred to by the federal statute section numbers.

[13] 33 U.S.C. § 905(a) (1976) provides:

this question granted summary judgment in favor of WMATA.[14] We reverse.

In reaching their decisions, the district courts relied exclusively upon the fact that WMATA furnished the workmen's compensation insurance, accepting the argument that section 904(a) employer immunity is a *quid pro quo* for providing such insurance. The courts premised their *quid pro quo* conclusion upon the assumption that WMATA was *legally required* to purchase the compensation insurance. A closer analysis of the language and purpose of the Act and the relevant case law leads to the conclusion that in these circumstances WMATA was not *required* to provide the compensation insurance. Furthermore, the voluntary provision of such insurance does not entitle the provider to the statutory employer immunity of section 905(a).

To analyze the intended operation of the compensation insurance provisions, one must begin with the overall purpose and design of the Longshoremen's Act. As this court acknowledged in *Potomac Electric Power v. Wynn*, 343 F.2d 295, 296 (D.C. Cir. 1965) (footnote omitted):

> The Longshoremen's and Harbor Workers' Compensation Act must be construed liberally in favor of the injured employee. Narrow statutory construction

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(a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee . . . .

[14] Appellants challenge the grant of summary judgment on the section 905(a) issue in the following cases: Wilmes v. Washington Metropolitan Area Transit Auth., No. 81-0114 (D.D.C. Dec. 16, 1982); Buchanan v. Bechtel Assoc. Prof. Corp., No. 81-3057 (D.D.C. Nov. 19, 1982); Williams v. Washington Area Metropolitan Transit Auth., No. 82-0999 (D.D.C. Oct. 6, 1982); Clanagan v. Washington Metropolitan Area Transit Auth., No. 81-1481 (D.D.C. Sept. 2, 1982); Walker v. Washington Metropolitan Area Transit Auth., No. 81-1125 (D.D.C. Sept. 2, 1982); Johnson v. Bechtel Assoc. Prof. Corp., No. 81-0963 (D.D.C. Aug. 24, 1982); Eighmey v. Bechtel Assoc. Prof. Corp., No. 81-1261 (D.D.C. July 30, 1982).

> should not deprive the injured employee of either his compensation or his claim in damages against third parties.

This overriding purpose underlies our interpretation of sections 904 and 905 of the Act.

The Act is designed to insure that all employees are covered by worker's compensation insurance and will thereby receive prompt compensation for work-related injuries. To assure the availability of compensation, employers are required to carry insurance. 33 U.S.C. § 932 (1976). Failure to do so may result in criminal sanctions. *Id.* § 938. In return for carrying the required insurance, an employer is absolved from all other liability, even if the employee's injury is attributable to employer negligence. *Id.* § 905. In the scheme of the Act, not only is the employee entitled to prompt compensation payments, but he also retains the right to sue any third party whose negligence may have caused or contributed to his injuries. *Id.* § 933. When a job involves a general contractor and subcontractors, the Act requires the subcontractor to obtain the workmen's compensation insurance. *Id.* § 904. The general contractor is not obligated to obtain insurance "unless" the subcontractor fails to do so. *Id.*

While the Act does not expressly designate who obtains section 905 employer immunity when a general contractor and subcontractor are involved, courts have allowed a general contractor to invoke the statutory immunity *only* when he was *legally required to*, and did in fact, provide workmen's compensation insurance. When both the general contractor and the subcontractor carry workmen's compensation insurance, courts have held that *only* the subcontractor is entitled to statutory immunity. The general contractor is denied section 905(a) immunity because he is not *statutorily* required to carry insurance. *Thomas v. George Hyman Const. Co.*, 173 F. Supp. 381 (D.D.C. 1959). *Accord DiNicola v. George Hyman Const. Co.*, 407 A.2d 670, 674 (D.C. App. 1979) ("[T]he

Longshoremen's Act[] impose[s] on the general contractor the duty to secure compensation insurance *only* if the subcontractor has failed to do so."); *Probst v. Southern Stevedoring Co.*, 379 F.2d 763, 766 (5th Cir. 1967) ("[T]he structure of §§ 904, 905 . . . add up to show that the provision imposing on the general contractor compensation liability to an employee of a subcontractor is a secondary, protective one.").[16]

A fundamental premise of the compensation insurance scheme is that the general contractor's statutory duty to

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[16] *Probst* expressly reserved

> the question of what ought to be done if the general contractor, or general employer, is actually *required* to pay compensation benefits to the injured employee of the subcontractor under § 904.

379 F.2d at 767 (footnote omitted) (emphasis added). However, the question left open in *Probst* is not the precise issue herein. WMATA was not "required" to obtain workmen's compensation insurance under section 904. WMATA *voluntarily* assumed that responsibility.

The fact that WMATA voluntarily obtained compensation insurance also distinguishes the WMATA case from Fiore v. Royal Painting Co., 398 So. 2d 863 (Fla. Dist. Ct. App. 1981). In *Fiore*, the subcontractor's insurance *lapsed* unbeknownst to the general contractor. Following the work-related death of an employee of the subcontractor, the general contractor payed direct benefits to the decedent's widow and children. In a subsequent wrongful death action, the defendant-contractor moved for and obtained summary judgment based upon section 905(a) employer immunity.

Reversing the grant of summary judgment on appeal, the *Fiore* court held that the general contractor was not entitled to statutory immunity. The court rejected the general contractor's *quid pro quo* argument and construed the Act to allow immunity only to the "actual employer (in this type of situation, a *complying* subcontractor)." *Id.* at 865. The *Fiore* court denied statutory immunity to the general contractor, notwithstanding the fact that his subcontractor had defaulted and the general contractor had in fact assumed his obligation under the statute. *Fiore* represents an extreme interpretation of the Act and is distinguishable on its facts.

secure workmen's compensation insurance is *secondary*. "The general contractor has a *secondary, guaranty-like liability.*" *Probst, supra,* 379 F.2d at 767 (emphasis added). The subcontractor is primarily and initially responsible; the general contractor becomes responsible *only* upon the subcontractor's default. As the court stated in *Thomas v. George Hyman, supra,* 173 F. Supp. at 383:

> The law does not accord to the general contractor the choice of either carrying workmen's compensation insurance, or subjecting himself to liability for negligence. The law requires him to carry insurance *only if the subcontractor fails to do so.* In such a contingency, the general contractor may well be free of all other liability if he in fact carried such insurance. He may not, however, *voluntarily* take out insurance that the law does not require and thereby secure freedom from liability for negligence. . . . Release from common law liability is a benefit accruing from carrying compensation insurance only in case the law imposes a duty to do so. One may not escape from such liability by taking out insurance that the law does not require.

(Emphasis added). This interpretation clearly comports with the plain language of sections 904 and 905, as well as with the overall statutory scheme.

By initially providing the insurance for all employees, WMATA pre-empted the subcontractors' statutory duty to secure such insurance. The language and scheme of the Act, as well as the relevant caselaw, clearly establish that a general contractor may not circumvent the intended operation of the Act by, in effect, choosing between either securing workmen's compensation insurance and thereby obtaining statutory employer immunity, or remaining potentially liable as a third-party tortfeasor. To accord WMATA section 905 employer immunity would frustrate the operation of the Act. WMATA cannot unilaterally decide to purchase the workmen's compensation insurance itself and thereby obtain section 905 im-

munity. To benefit from securing the insurance, WMATA must *first* require its subcontractors to purchase the insurance. It is only by providing compensation insurance *when the subcontractors fail to do so* that WMATA obtains immunity as a statutory employer.

WMATA suggests that its circumstance is analogous to the situation wherein the subcontractor fails to obtain insurance or the subcontractor's insurance lapses. In such instances, the statute provides that the general contractor then becomes responsible for assuring that workmen's compensation insurance is provided. However, WMATA's circumstance is not analogous. WMATA did not follow the statutory scheme; instead it pre-empted the proper functioning of the scheme. WMATA, the general contractor, *initially* provided the workmen's compensation insurance when it was under *no legal duty* to do so; the Authority thereby supplanted its subcontractors' primary, statutory duty.

WMATA attempts to justify its actions by explaining that its wrap-up insurance plan was "the only effective way to ensure that all employees would be covered by compensation insurance at all times." WMATA Reply Brief at 27. WMATA contends that after attempting to require all subcontractors to provide workmen's compensation insurance, it found the task impossible to administer. Therefore, after 1971 WMATA instituted a "coordinated insurance plan" whereby it purchased workmen's compensation insurance for all employees of all subcontractors. Although WMATA asserts that it was primarily concerned with fulfilling its section 904 duty, the Authority also reveals that the wrap-up insurance program "substantially lessen[ed] [its] administrative burden and effectuat[ed] a substantial savings in costs." WMATA Reply Brief at 27-28. That it was more convenient and cost effective to carry the insurance does not excuse deviation from the statutory scheme. Nor does the size of the project affect the intended operation of the statutory

provisions. WMATA had no statutory duty to provide insurance until and unless a subcontractor failed in its primary obligation to provide such insurance.

The problems caused by WMATA's deviation from the statutory scheme are evident in these cases. To the injured employees it appeared that their respective employers provided the workmen's compensation insurance. Therefore, when compensation claims were filed and paid, the employees reasonably assumed that under section 905(a) of the Act their immediate employer could not be sued for negligence. Consequently, the employees attempted to exercise their statutory right to a third-party action by instituting suit against WMATA. Only then did it become clear who had actually secured and paid for the compensation insurance. For some employees this discovery came too late to institute suit against their immediate employer who might have been a third-party defendant if WMATA was entitled to section 905 employer immunity. The net effect of this scenario was to confuse and confound the injured employee whom the Act was designed to protect. With the statute of limitations running on his third-party claim, it was unclear to the injured employee which entity, if not both, would be entitled to employer immunity.

The language and purpose of sections 904(a) and 905(a) of the Longshoremen's and Harbor Workers' Compensation Act, as well as the relevant case law, compels the conclusion that WMATA be denied statutory employer immunity.[16] The Act clearly contemplates that an injured employee can receive compensation benefits and have the right to bring a third-party action. We will not immunize a potential third-party defendant when the only basis for so doing rewards that party for circumventing the statutory scheme. Notwithstanding the fact that it

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[16] We express no opinion on the issue whether the *subcontractors* have "secure[d]" compensation insurance under section 904(a) and would thereby be entitled to immunity.

provided the workmen's compensation insurance, WMATA is amenable to suit as a potentially liable third-party tort-feasor. The grants of summary judgment to WMATA are reversed.

III. Rule 15(c) of the Federal Rules of Civil Procedure

In four of the seven actions on appeal, the employees first sued Bechtel and subsequently added WMATA as a defendant by amending their complaint[17] pursuant to Rule 15(c) of the Federal Rules of Civil Procedure.[18]

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[17] In the following cases the district courts allowed the plaintiff to amend his complaint to add WMATA as a defendant: Johnson v. Bechtel Assoc. Prof. Corp., No. 81-0963 (D.D.C. May 18, 1982); Buchanan v. Bechtel Assoc. Prof. Corp., No. 81-3057 (D.D.C. July 7, 1982); Clanagan v. Washington Metropolitan Area Transit Auth., No. 81-1481 (D.D.C. July 8, 1982); Wilmes v. Washington Metropolitan Area Transit Auth., No. 81-0114 (D.D.C. July 13, 1982).

In *Wilmes*, the plaintiff also sought to amend his complaint via Rule 15(c) to add the subcontractors as defendants. The district court denied plaintiff's motion to amend. Wilmes v. Washington Metropolitan Area Transit Auth., No. 81-0114 (D.D.C. Dec. 16, 1982). Wilmes appeals this denial and for the reasons stated in this section of our opinion, we remand this aspect of the case also. A more complete factual record is a prerequisite for review of a Rule 15(c) decision.

[18] Rule 15(c) of the Federal Rules of Civil Procedure provides:

> (c) Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits,

In each instance, WMATA moved for summary judgment on two alternative grounds. First, WMATA asserted that it was not a proper defendant because the requisites of Rule 15(c) were not satisfied. Second, WMATA argued that under section 905(a) of the Longshoremen's Act it was immune from suit as a statutory employer. In each case the district court granted summary judgment for WMATA on the section 905(a) ground and expressly declined to address the Rule 15(c) issue.[10] WMATA seeks to justify the grant of summary judgment in its favor by reurging the contention that it was not properly added as a defendant.

Rule 15(c) permits an amendment adding a party to relate back to the date of the original pleading if three conditions are met: (1) the claims against the new party must arise out of the same occurrence as the claims in the original pleading; (2) the new party must have received "notice of the institution of the action" before the limitations period expired; and (3) the new party must know "or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him." *Norton v. International Harvester Co.*, 627 F.2d 18, 20 (7th Cir. 1980); *Hernandez Jimenez v. Calero Toledo*, 604 F.2d 99, 102-03 (1st Cir. 1979). To permit the addition of a party via a Rule 15(c) amendment, the court must be satisfied that all three tests are met.

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and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

[10] Johnson v. Bechtel Assoc. Prof. Corp., No. 81-0963, slip op. at 1 (D.D.C. Aug. 24, 1982); Clanagan v. Washington Metropolitan Area Transit Auth., No. 81-1481, slip op. at 6 n.2 (D.D.C. Sept. 3, 1982); Buchanan v. Bechtel Assoc. Prof. Corp., No. 81-3057, slip op. at 2 (D.D.C. Nov. 19, 1982); Wilmes v. Washington Metropolitan Area Transit Auth., No. 81-0114 (D.D.C. 16, 1982).

WMATA argues that two of the Rule 15(c) criteria were not satisfied and, therefore, that it was improperly made a defendant. First, WMATA notes that the amended complaints adding it as a defendant were filed after the statute of limitations on the underlying tort had run. While Rule 15(c) removes a statute of limitations bar by allowing the amended complaint to "relate back" to the date of the original filing, the party to be added must have received sufficient "notice" of the action so that it is not prejudiced in maintaining a defense. WMATA contends, *inter alia*, that it received notice only upon the actual filing of the amended complaint and that because that filing was made after the expiration of the statute of limitations, such notice is *per se* insufficient. Plaintiffs-appellees counter that because of the "identity of interests" between WMATA and Bechtel, WMATA received constructive notice prior to the expiration of the statutory period. In addition, plaintiffs-appellees assert that WMATA has not been prejudiced by receiving such belated notice. WMATA also contends that the "mistake" requirement of Rule 15(c) was not satisfied because the plaintiffs did not initially make a "mistake" regarding the proper party to be sued, but rather made a tactical decision to sue Bechtel. Plaintiffs-appellees assert that they did in fact make a reasonable legal "mistake" in choosing the original defendant.

Because resolution of these issues in the context of a Rule 15(c) decision involves inherently factual determinations, a complete factual record is required. *McCurry v. Allen*, 688 F.2d 581, 585 (8th Cir. 1982) (Remanded for an evidentiary hearing and findings of fact because "[t]he requirements of Rule 15(c) raise factual issues not susceptible to determination at the appellate level."); *Ringrose v. Engelberg Huller Co.*, 692 F.2d 403 (6th Cir. 1982). Furthermore, on the motion for summary judgment each district court expressly declined to reach the Rule 15(c) issue. This court will not, therefore, resolve this issue notwithstanding the fact that it has been briefed and argued. We express no opinion on the resolution of

this issue, leaving the matter in the first instance to the district courts. The cases are remanded for the development of an adequate factual record and a ruling by the district courts on the propriety of adding WMATA as a defendant by a Rule 15(c) amendment.

IV. Section 933(b) of the Longshoremen's and Harbor Workers' Act

On August 28, 1981, appellant Williams received a lump-sum workmen's compensation award. More than six months later, on April 1, 1982, Williams instituted a third-party negligence action against WMATA. The district court dismissed Williams' action because it was not filed within the six-month statutory period as provided in 33 U.S.C. § 933(b).[20] *Williams v. Washington Metropolitan Area Transit Auth.*, No. 82-0999 (D.D.C. Oct. 6, 1982). Williams challenges the district court's dismissal of his action and attempts to excuse his delay in instituting suit by relying upon the so-called "*Czaplicki* exception," fashioned by the Supreme Court in *Czaplicki v. The Hoegh Silvercloud*, 351 U.S. 525 (1956).

In *Czaplicki*, an injured employee accepted a workmen's compensation award which, under the statute as it existed then, effected an automatic assignment of his third-party claims to his employer. In turn, his employer's insurer was subrogated to the employer's rights. Seven years after receiving the compensation award, when no third-party action had been filed, Czaplicki instituted a negligence action against several potentially liable third-

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[20] Section 33(b) of the Longshoremen's Act, 33 U.S.C. § 933(b) (1976), provides:

> Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

parties. Czaplicki's employer and one of the third-party defendants were insured by the same company, Travelers Insurance Company. Recognizing that the substantial conflict of interests inherent in this circumstance made it extremely unlikely that the insurer would proceed against this third-party, the *Czaplicki* Court held that section 33 (b) did not prevent the employee from pursuing his third-party action. The Court reasoned that in order to insure that a party with sufficient adversarial interests remained to institute a third-party action, the employee would be permitted to maintain his action, notwithstanding the fact that he had accepted an award of compensation. The *Czaplicki* Court found it significant that there was "no other procedure by which [the employee could] secure his statutory share in the proceeds, if any, of his right of action." *Id.* at 532-33.

In 1959, after *Czaplicki*, Congress amended the relevant provisions of the Act to their present form by eliminating the election requirement under subsection (a), postponing assignment of the claim under subsection (b) until six months after acceptance of a compensation award, and allowing the assignee to retain twenty percent of any excess recovery as a financial incentive to pursue a third-party action. Act of August 18, 1959, Pub. L. No. 86-171, 73 Stat. 391. Under the statute as amended, an injured employee is not required to elect between receiving a workmen's compensation award and seeking damages from a third party. 33 U.S.C. § 933(a). The employee may accept a compensation award and, as long as he acts within six months, institute an action against any potentially liable third party. If, however, he fails to institute suit within six months, acceptance of the compensation award acts as an assignment to the employer of any and all third-party claims which the employee might have. *Id.* § 933(b). The insurer of the employer continues to be subrogated to all rights of the employer. *Id.* § 933(h).

Following amendment of the Act, the Supreme Court held, in *Rodriquez v. Compass Shipping Co.*, 451 U.S. 596 (1981), that failure to institute a third-party action within the statutory six-month period was an absolute bar to a subsequent action by the employee. Although *Rodriquez* did not involve a *Czaplicki* conflict-of-interest and the Court expressly declined to reach the *Czaplicki* scenario,[21] the opinion for the Court cast serious doubt upon the viability of the *Czaplicki* conflict-of-interest exception. The *Rodriquez* Court was careful to confine *Czaplicki* to the "peculiar facts" of that case and emphasized the importance of the intervening amendments in alleviating the hardship which existed in the *Czaplicki* circumstance. The Court stated:

> [T]he 1959 and 1972 Amendments have substantially undercut the basis for the *Czaplicki* exception to § 33(b). The Court was troubled in *Czaplicki* because under the Act in 1956 there was "no other procedure" by which a longshoreman could enforce his rights against a third party where the employer failed to sue due to a conflict of interest. 351 U.S., at 532-533. After the 1959 amendments, there is such a procedure: the employee may simply file his own third-party suit within six months after accepting compensation.

Rodriquez, supra, 451 U.S. at 617 n.41. Relying upon the express statutory language, the *Rodriquez* Court emphasized the mandatory nature of the assignment which occurs after the six-month period. "Congress unequivocally made the choice in favor of first giving the em-

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[21] In a footnote the *Rodriquez* Court stated:

> Whether the statutory language [section 33(b)] provides the exclusive solution for unusual conflict-of-interest problems, such as that identified in *Czaplicki*, is a question that is not presented on the facts of these cases. We accordingly do not decide whether, or to what extent, *Czaplicki* survived the 1959 amendments.

451 U.S. at 612 n.30.

ployee exclusive control of the cause of action for a 6-month period and then giving the employer exclusive control thereafter, instead of opting for any form of simultaneous joint or partial control." *Id.* at 612. Finally, the Court reasoned that the legislative history "forecloses the argument that Congress did not intend an assignment of a third-party claim to be effective unless there was an absence of any potential conflict of interest between the assignee and the [employee]." *Id.*

Considering *Czaplicki*, *Rodriquez*, and the statute as it exists today, we conclude that the *Czaplicki* exception no longer permits an employee to institute a third-party action after the six-month statutory window.[22] Given the statutory language and legislative history relied upon by the *Rodriquez* Court, it is apparent that reading a *Czaplicki* exception into the section 33(b) assignment scheme would frustrate the balance struck by Congress between the employer's and employee's interests. That balance alleviates the hardship which *Czaplicki* was crafted to remedy. Acceptance of a compensation award no longer automatically assigns the employee's third-party claims to his employer. Where the employee suspects a potential *Czaplicki* conflict-of-interest he has six months after accepting a compensation award within which to institute suit himself.

For the foregoing reasons, we do not think that the *Czaplicki* exception survived the post-*Czaplicki* amendment of the Act and *Rodriquez*. Plaintiffs who accept

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[22] Our decision is in accord with an earlier decision by a panel of this court, Phillippi v. Bechtel Assoc. Prof. Corp., No. 82-1615 (D.C. Cir. Feb. 24, 1983), and with two unpublished memorandum opinions by district courts in this Circuit. Phillippi v. Bechtel Assoc. Prof. Corp., No. 81-1154 (D.D.C. April 28, 1982) and Jenkins v. Bechtel Assoc. Prof. Corp., No. 81-2236 (D.D.C. Feb. 23, 1982). The District of Columbia Court of Appeals has also recently repudiated the conflict-of-interest exception. Thomas Westbrook v. Hutchinson Crane Ecavating Co., No. 82-1151 (D.C. App. June 30, 1983).

compensation awards must comply with section 33(b) and institute any third-party claims within six months of accepting such award. Because Williams failed to institute his action within the statutory time frame the district court properly dismissed the action. The fact that both parties were insured by the same compensation carrier does not excuse the plaintiff's delay in instituting his third-party claim. The judgment of the district court is affirmed.

V. Conclusion

The Clerk is directed to issue judgments in the respective cases in accordance with the foregoing opinion.